RENAL LINK (KL) SDN. BHD.

v.

DATO' DR. HARNAM SINGH

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
N.H. CHAN JCA
MAHADEV SHANKAR JCA
[CIVIL APPEAL NO: W-02-184 OF 1994]
8 APRIL 1997

TORT: *Nuisance - Emission of obnoxious fumes - Liability - Whether fumes of sufficient quantity as to be noxious - Whether there was escape of fumes - Rule in Ryland v. Fletcher - Whether there was misdirection by trial Judge*

CIVIL PROCEDURE: *Trial - Adducement of additional evidence - Appellate stage - Prerequisites - Adducement of evidence on matters that had occurred since judgment - Whether allowable - Whether amounted to a fesh trial on remotely relevant issue*

CIVIL PROCEDURE: *Trial - Adducement of additional evidence - Appellate stage - Application to correct evidence given in trial Court - Alleged error in recording of evidence by trial Court - Whether application contrary to established procedure - Whether complaint ought to be properly raised in trial Court - Proper test - Consideration of Lau Foo San v. Government of Malaysia and Ladd v. Marshall.*

The appellant was held liable for nuisance by the High Court for emitting from their premises obnoxious fumes that invaded the premises occupied by the respondent. The facts showed that damages of RM40,000 was awarded against the appellant, and in addition, a perpetual injunction was also granted restraining the appellant from continuing the nuisance. The appellant appealed against the decision, and at the outset, raised two preliminary motions by which they sought to (i) adduce further evidence to show that they had, immediately after the judgment of the Court below, removed the alleged deleterious substances from its premises (ii) admit the affidavit of DW2, who was the respondent's second witness at the trial, to amend a portion of the note of his evidence as recorded by the trial Judge which the appellant said was inaccurate (iii) adduce further evidence from one Dr. Abdul Rahim who gave a report about eight months after the learned Judge had handed down her decision.

Held:
Per Gopal Sri Ram JCA

[1] If the injunction were, on the basis of any fresh evidence, to be dissolved, the harm to the respondent would be very real, in that the appellant would be at liberty to once again bring the offending substances onto the premises. This would result in the respondent undertaking a fresh burden of making another application to reinstate the injunction. The balance of justice lay in favour of refusing the first prayer in the appellant's first motion.

[2] The application to correct the evidence of DW2 in the passage in question is contrary to established procedure and entirely unwarranted. This matter, in any case, ought to have been raised in the Court below. The appellant failed to do this and he cannot now contend that the learned trial Judge had made an error in recording the said evidence.

[3] The application to adduce the evidence of Dr. Abdul Rahim did not meet the requisite test as tabulated in *Ladd v. Marshall*. Clearly, had the appellant exercised reasonable diligence the evidence now sought to be adduced could have been obtained from the witness concerned at the trial of the action.

[4] This appeal turns upon a pure question of fact based upon the credibility of witnesses who gave their evidence at the trial. The function of determining where, on a balance of probabilities, the truth lay is entrusted by law to the trial Court.

[4a] The judgment under appeal does not contain any error that warrants appellate interference. The learned trial Judge had directed herself correctly upon the law of nuisance and the rule in *Rylands v. Fletcher*. She had also evaluated the material placed before her with care and her conclusions of fact are reasonably supported by the evidence. Going by the appeal record, there was more than sufficient admissible evidence to warrant a decision against the appellant.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

TORT: *Kacau-ganggu - Pengeluaran asap yang amat busuk - Tanggungan - Samada asap yang dikeluarkan dalam kuantiti yang cukup untuk menjadi berbahaya - Samada asap terkeluar - Kaedah dalam Ryland v. Fletcher - Samada berlaku salah arahan oleh Hakim perbicaraan*

PROSEDUR SIVIL: *Pengemukaan keterangan tambahan - Peringkat rayuan - Prasyarat - Pengemukaan keterangan perkara-perkara yang telah berlaku sejak penghakiman - Samada boleh dibenarkan - Samada membawa kepada suatu perbicaraan baru mengenai isu di mana perkaitannya adalah tidak kena mengena*

PROSEDUR SIVIL: *Pengemukaan keterangan tambahan - Peringkat rayuan - Permohonan untuk membetulkan keterangan yang diberikan dalam Mahkamah perbicaraan - Kesilapan yang dikatakan dalam mencatakan keterangan oleh Mahkamah perbicaraan - Samada permohonan bertentangan dengan prosedur tetap - Samada aduan harus dibangkitkan dengan betul dalam perbicaraan Mahkamah - Ujian yang wajar - Balasan bagi Lau Foo San v. Government of Malaysia dan Ladd v. Marshall*

Perayu telah dipertanggung-jawabkan bagi kacau-ganggu oleh Mahkamah Tinggi kerana mengeluarkan asap yang sangat busuk daripada prenmis mereka yang telah memasuki premis yang diduduki oleh responden. Fakta-fakta menunjukkan bahawa gantirugi sebanyak RM40,000 telah diberikan terhadap perayu, dan sebagai tambahan, suatu injunksi berkekalan telah juga diberikan yang menghalang perayu daripada meneruskan kacau-ganggu itu. Perayu telah merayu terhadap keputusan itu, dan pada mulanya, telah membangkitkan dua usul asal melalui yang mana mereka telah cuba untuk (i) mengemukakan keterangan yang selanjutnya bagi menunjukkan bahawa mereka telah, segera selepas penghakiman Mahkamah di bawah, mengalihkan bahan-bahan yang dikatakan merosakkan kesihatan itu daripada premisnya (ii) memasukkan afidavit DW2, yang merupakan saksi kedua responden di perbicaraan, untuk meminda satu bahagian dari nota keterangan beliau sepertimana yang telah dicatatkan oleh Hakim perbicaraan yang mana perayu telah menyatakan adalah tidak tepat. (iii) mengemukakan keterangan yang selanjutnya daripada seorang yang dikenali sebagai Dr. Abdul Rahim yang telah memberikan laporan lebihkurang lapan bulan selepas Hakim yang bijaksana menyerahkan keputusannya.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Jika injunksi itu, berdasarkan mana-mana keterangan yang baru, hendak dilupuskan, kemudaratan kepada responden akan menjadi kenyataan, iaitu bahawa perayu akan bebas untuk sekali lagi membawa bahan-bahan yang menyalahi itu ke dalam premis tersebut. Ini akan menyebabkan responden menjalankan satu bebanan yang baru dengan membuat satu lagi permohonan bagi memulihkan injunksi itu. Imbangan keadilan memihak kepada keengganan menerima pohonan pertama dalam usul pertama perayu.

[2] Permohonan untuk membetulkan keterangan DW2 dalam rangkap yang menjadi persoalan adalah bertentangan dengan prosedur yang tetap dan sesungguhnya tidak diwajarkan. Perkara ini, dalam mana-mana keadaan, seharusnya dibangkitkan dalam Mahkamah di bawah. Perayu telah gagal untuk melakukan sedemikian dan kini beliau tidak boleh menegaskan bahawa Hakim perbicaraan telah membuat kesilapan dalam mencatatkan keterangan tersebut.

[3] Permohonan untuk mengemukakan keterangan Dr. Abdul Rahim tidak memenuhi ujian yang diperlukan yang telah dijadualkan dalam *Ladd v. Marshall*. Jelas, sekiranya perayu telah melaksanakan usaha yang wajar, keterangan yang kini cuba untuk dikemukakan mungkin telah diperolehi daripada saksi yang berkenaan di perbicaraan tindakan tersebut. Tidak terdapat sebarang merit dalam permohonan ini.

[4] Rayuan ini berpaling kepada persoalan fakta yang sebenarnya berdasarkan keboleh-percayaan saksi-saksi yang telah memberikan keterangan di perbicaraan. Fungsi menentukan di mana, atas imbangan kebarangkalian, terletaknya kebenaran telah diamanahkan oleh undang-undang kepada Mahkamah perbicaraan.

[4a] Penghakiman yang sedang dirayui tidak mengandungi sebarang kesilapan yang mewajarkan campur-tangan bidang rayuan. Hakim perbicaraan yang bijaksana telah mengarahkan dirinya denggan betul berhubung dengan undang-undang kacau-ganggu dan kaedah dalam *Rylands v. Fletcher*. Beliau telah juga menilaikan bahan-bahan yang telah dikemukakan kepada beliau dengan penuh hemat dan keputusan-keputusan faktanya adalah disokong dengan wajarnya oleh keterangan. Menurut rekod rayuan, terdapat keterangan yang lebih daripada mencukupi yang boleh diterima bagi mewajarkan satu keputusan terhadap perayu.

[Rayuan ditolak.]

Cases referred to:
Chan Kok Liang v. Tan Swan Cheng & Anor. [1970] 2 MLJ 253 ***(foll)***
Lau Foo Sun v. Government of Malaysia [1970] 2 MLJ 70 ***(foll)***
Ladd v. Marshall [1954] 3 All ER 745 ***(foll)***
Rylands v. Fleetcher [1868] 3 HL 330 ***(cit)***

[Appeal from High Court Malaya, Kuala Lumpur; Civil Suit No: S4-22-35-92]

For the appellant - P.S. Ranjan (M.S. Dhillon & V. Sumitra with him); M/s. P.S. Ranjan & Co.
For the respondent - Joginder Singh; M/s. Joginder Singh & Co.

JUDGMENT

Gopal Sri Ram JCA:

This appeal is directed against the decision of the High Court at Kuala Lumpur delivered on 20 August 1994 in an action brought by the respondent before us as plaintiff against the appellant as defendant. At the conclusion of arguments before us, we dismissed the appeal. The reasons for our decision now follow.

The respondent's claim against the appellant is based on the tort of nuisance. The substance of the respondent's complaint is that he was deprived of the beneficial enjoyment of his premises by reason of the emission of noxious fumes from the premises occupied by the appellant. Both the appellant and respondent are involved in the practice of medicine. The appellant operates a renal clinic at which patients receive haemodialysis. The respondent uses his premises as a clinic and hospital for treating ear, nose and throat ailments. Both facilities are in the same building, but on different floors. The appellant's clinic is located on the floor above the respondent's premises – directly above the reception area of the respondent's clinic.

Haemodialysis is a process that calls for the use of chemicals. One such chemical is formalin. Another is renalin. These are chemicals with a powerful odour. Exposure to their fumes is harmful to health. About this there is no dispute.

The respondent came into occupation of his premises some eighteen years before the appellant commenced its operations. Throughout this period there was no complaint of the present nature either by him, his staff or his patients. It was only after the arrival of the respondent that the respondent, his staff and patients began to experience discomfort. According to the respondent and his witnesses, all of whom were believed by the trial Judge, the harm they suffered was of a serious nature. We think it appropriate to quote the following passage from the respondent's evidence in which he describes the nature of the discomfort that he suffered:

> I may not look sick but the last 2-3 years my skin has become very dry. My eyes are often red and swollen. I go home with puffy eyes. My eye lids are painful due to chronic exposure. I am suffering from skin disease.
>
> I have consulted skin specialist three times this year. I suffer three types of effects, first the acute alticules which are daily affair. Second the sub-acute attacks. Third the chronic effects.

> Acute attack, in the morning when I get into the office within a few hours, my eyes smart. They become uncomfortable. There is a burning sensation in my nose, my throat and my tongue goes numb. Then I get a sort of discomfort behind my chest bone and I find it difficult to breathe. I have a contracted feeling in my chest. I can't breathe. I don't feel well.
>
> …
>
> At certain times of the day if I enter my room when the concentration of the gas is high I get goose flesh i.e. virtually like hair standing on the ends and not infrequently I get headaches. There are the acute daily attacks that I suffer.
>
> The second type – are the ones I feel the cumulative effect. The effect of a toxic gas depends (1) on the dose of gas, (2) type of gas and (3) duration of exposure of gas. So at the end of the day, I feel very tired and giddy. There are times when I have collapsed in the house.

In the Court below the appellant resisted the claim on three principal grounds, namely:

(1) that it did not emit the noxious fumes in question;

(2) that the acts complained of did not amount to a nuisance; and

(3) that none of the acts complained of caused the annoyance, discomfort and injury alleged by the respondent.

The learned trial Judge, after a careful review of the evidence and the argument of Counsel held in the respondent's favour. She awarded damages of RM40,000 and granted a perpetual injunction restraining the appellant from continuing the nuisance in question. Against this decision the appellant appealed to this Court.

When the appeal was called on for hearing, there were four motions before us. Two of them were filed by the appellant and two by the respondent. The respondent's motions were, as properly submitted by his Counsel Joginder Singh, merely consequent upon the appellant's.

The first of the appellant's motions is dated 5 September 1995. By it the appellant sought two orders. First, to adduce further evidence to show that the appellant had, immediately following the judgment in the Court below, removed the alleged deleterious substances from its premises. Second, to admit the affidavit of one Foo Chin Jin who was the respondent's second witness (DW 2) at the trial of the action to amend a portion of the note of his evidence as recorded by the learned trial Judge which is allegedly inaccurate in that it does not reflect what he had actually said at the trial. The evidence

complained of is an admission by DW 2 which he now says he never made. It appears at p. 417 of the record of appeal (p. 367 of the printed note) and reads as follows:

> I agree that there is intolerable level of toxic gas in the plaintiff's premises.

The appellant's second motion is dated 17 January 1996. By it the appellant sought to adduce further evidence from one Dr. Abdul Rahim Rahman Hamzah who had given a report dated 4 December 1995, that is to say, about eight months after the learned Judge had handed down her decision in the action.

After hearing arguments, we exercised our discretion and declined, with costs, both motions by the appellant. There are serious impediments that lie in their way.

In respect of the application to adduce evidence of matters that had occurred since judgment, namely, that the offending substances had been removed from the premises under the appellant's occupation, this was hotly disputed by the respondent in the first of its motions. Permitting the appellant's application would have meant the conducting of a fresh trial on an issue the relevance of which was both remote and tenuous. It must be borne in mind that the appellant's purpose in asking for the reception of the fresh evidence was to rid itself of the injunction granted after trial. The argument here is that since the deleterious substances had been removed, there was no need for an injunction. But, surely this argument is met by the proposition that if the offending substances had been removed, then the appellant need have no fear of the injunction. On the other hand, if the injunction were, on the basis of any fresh evidence, to be dissolved, the harm to the respondent would be very real, in that the appellant would then be at liberty to once again bring the offending substances onto the premises. This would result in the respondent undertaking a fresh burden of making another application to reinstate the injunction. Having regard to all the relevant circumstances of the case we came to the conclusion that the balance of justice lay in favour of refusing the first prayer in the appellant's first motion.

As regards the second prayer in the first motion, namely, to correct the evidence of DW 2 in the passage earlier reproduced, we found the application to be contrary to established procedure and entirely unwarranted. So far as procedure is concerned, we need look no further than the decision of the Singapore Court of Appeal in *Chan Kok Liang v. Tan Swan Cheng & Anor.* [1970] 2 MLJ 253, cited to us by Encik Joginder Singh. There, Wee Chong Jin CJ, said (at p. 254):

> It is not the practice of the Courts in Singapore [and we add that the same may be said of Courts in Malaysia] to have a *verbatim* shorthand note taken of the entire proceedings in Court. If it is intended that any note taken by Counsel at the trial of an action be accepted as part of the notes of evidence for use by an appellate Court, it is desirable that the trial Judge and Counsel for the other party or parties should be supplied at the earliest possible opportunity with a copy of the note so made for correction or acceptance or otherwise. If the trial Judge and Counsel for all parties agree to the original or a corrected version then such agreed original or corrected version can properly be included in the record of appeal as part of the notes of evidence. Where no version can be so agreed, then in any application for leave to include the note made or taken by Counsel at the trial, the affidavit in support of the application ought to set out the circumstances under which the note was made or taken and the steps taken to obtain the agreement of all concerned together with all correspondence relating to the attempt to obtain such agreement.

We entirely agree with this passage. It provides a complete answer to the appellant's first motion. But there is a more compelling reason for refusing the order sought. A careful perusal of the record reveals that at the trial, Encik Joginder Singh had, in a written note of his submissions, referred to and relied upon the admission made by DW 2 with no protest whatsoever from Encik Ranjan who appeared for the instant appellant in the Court below. To compound matters, the record also reveals that Encik Ranjan had himself referred to the very same page of the printed note of the evidence at which DW 2's admission appears. When we drew this to Encik Ranjan's attention he frankly conceded that he ought to have raised this matter with due diligence in the Court below and that he had not done so. In these circumstances it certainly does not lie in the mouth of the appellant to now contend that the learned trial Judge had made an error in recording DW 2's evidence.

Turning now to the second motion, we formed the view that the application to adduce the evidence of Dr. Abdul Rahim Rahman did not meet the requisite test. That test was formulated by Suffian FJ (as he then was) in *Lau Foo Sun v. Government of Malaysia* [1970] 2 MLJ 70 in the following terms:

> To justify the reception of this evidence three conditions must be fulfilled:
>
> First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
>
> Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive;
>
> Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

Ladd v. Marshall [1954] 3 All ER 745 was cited by his Lordship as authority for the proposition.

In the present case, the first of the three conditions adverted to by Suffian FJ was found to be absent. On the contrary, we came to the conclusion that had the appellant exercised reasonable diligence the evidence now sought to be adduced could have been obtained from the witness concerned at the trial of the action. There was therefore no merit whatsoever in the second motion.

The dismissal of the appellant's two motions rendered academic the motions filed by the respondent. Accordingly, we made no order upon each of them. However, since their filing had been necessitated by the appellant's motions, we directed the appellant to also bear the costs thereby incurred.

So much for the interlocutory matters before us.

The substantive appeal, according to Encik Ranjan, turns upon the resolution of three questions which he submitted should be answered in the appellant's favour. These are:

(1) Did the appellant produce fumes on their premises in sufficient quantities so as to call them noxious?

(2) Was there an escape of these fumes?

(3) Was there any injury to the respondent or to the use and enjoyment of his premises?

Encik Ranjan carefully took us through the evidence led at the trial. He drew attention to the fact that there was another medical facility known as Lablink in the same building from which the noxious fumes could have equally been emitted. It was submitted that on the totality of the evidence there was absent any connection in point of causation between the appellant and the noxious fumes that had invaded the respondent's premises. He complained that this aspect of the case had not received any, or any sufficient, attention from the learned trial Judge.

After a careful consideration of the submissions advanced in support of and in opposition to the appeal, we came to the conclusion that the appeal lacked merit. As regards causation, Encik Joginder Singh rightly pointed out that it had never been the appellant's case in the Court below that Lablink had been the source of the noxious fumes in question. Small wonder, therefore, that the learned Judge did not address her mind to this issue.

In our judgment this appeal really turns upon a pure question of fact based upon the credibility of the witnesses who gave their evidence at the trial. The function of determining where, on a balance of probabilities, the truth lay is entrusted by law to the trial Court. Unless we, as a Court of appeal, are convinced that there was no judicial appreciation of the evidence by the trier of fact, or that the audio-visual advantage reserved to a trial Judge had been missed or that the findings made do not accord with the probabilities of the case when taken as a whole, it would not be open to us to intervene and upset the findings made by a trial Judge.

The judgment under appeal in the present instance does not contain any error warranting appellate interference. On the other hand, we are satisfied that the learned Judge has done all that is required of her by law. She has admirably analysed the material before her and drawn the inferences properly admitted by the evidence. She directed herself correctly upon the law of nuisance and the rule in *Rylands v. Fletcher* [1868] 3 HL 330. She evaluated the material placed before her with care and her conclusions of fact are reasonably supported by the evidence. Having scrutinised the record of appeal with care, we are of opinion that there was more than sufficient admissible evidence before the learned Judge to warrant the three questions posed by Encik Ranjan being answered against the appellant. The learned Judge resolved them against the appellant. We agree with her and would do likewise.

The appeal was therefore dismissed. The judgment of the learned Judge and the orders made by her were affirmed. We also ordered that the costs of the appeal be taxed and be paid by the appellant to the respondent. The deposit paid into Court by the appellant was ordered to be paid out to the respondent to account of his taxed costs.

Reported by WA Sharif